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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,
vs.
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

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Answering the brief as above entitled, we urge the following:

1. ACTION BY THIS COURT SHOULD BE DEFERRED UNTIL IT IS KNOWN THAT THE OPINION AS FILED BY THE SUPREME COURT OF MICHIGAN, IN CITY OF HIGHLAND PARK v. CLARK, IS FINAL AND OFFICIAL.

(a) We know from information contained in letters copied in the appendix to this brief that the opinion is not as the court wishes it, and that the copy included in respondent's brief is incorrect. We are told that the copy filed indicates that the opinion of Mr. Justice Bushnell was signed by all of the justices, which puts a different complexion on the interpretation to be applied. We are also informed of changes Mr. Justice Bushnell has requested the official reporter to make.

(b) A motion for rehearing has been filed, a copy of which appears in an appendix, which may result either in a different conclusion or a different opinion. This court, in previous cases where it has awaited the decision of a state court for an expression of local law, has deferred action on the petitions for certiorari until the state court had acted upon a petition for rehearing. See *City Company v. Stern,* and *Chase Securities Corp. v. Vogel,* 312 U. S. 666, 61 S. Ct. 823; and *Pomeroy v. National City Co.* (Minn.), 296 N. W. 513. The motion for rehearing addressed to the state court will point out the error by that court in assuming that a storm sewer is not a drainage facility. The record in this case demonstrates this factual error. See Master's report, R. p. 110. If the state court is convinced of this error, it will in all probability change its opinion.

2. EVEN IF THE STATE COURT'S OPINION REMAINS IN SUBSTANTIALLY THE SAME FORM AS THE ONE ON FILE, IT DEMONSTRATES THE TRUTH OF PETITIONERS' CONTENTION THAT THE LOWER COURT ERRED IN DETERMINING LOCAL LAW.

(a) An essential and necessary step in the lower court's reasoning was that a decree in *Township of Erin v. County of Macomb,* rendered by a circuit judge, was *res judicata,* although bondholders were not before the court in which the decree was rendered. The lower court said (R. 654): "The officers of the drain district represented all creditors of the district, including the bondholders, in the state court cases, and thus appellants (appellees) had notice and were given their day in court in those cases." Because of this, the lower court said later: "Those cases are *res judicata* of the determinative facts of this controversy." It will be remembered that the decree referred to in this case (R. 23) contains no statement that the project is not a drain, and no opinion appears with the decree. This statement of the lower court as to representation by the drain commissioner is flatly contradicted by the Michigan court. It says (see p. 9 of Respondents' Brief): "We do not say that the *Village of Oak Park* case, *supra,* is *res adjudicata* of the rights of these relator bondholders, nor do we hold that they had their day in court, through representation of the drain commissioner, who was the defendant in that action." While it says that the *Oak Park* case, which involved the same improvement, is a precedent which it should follow, that reasoning could not be applied here. The Martin Drain and Branches Drain never was adjudicated to be anything other than a drain by any state tribunal. The only finding on the subject was that of the Master in this case. It was, therefore, the duty of the

lower court to consider the facts concerning this structure and decide whether the evidence supports the conclusion that this structure was not a drain under Michigan law. It is only because of a peculiar conception of an agency existing between bondholders and drain district officers, now held unwarranted, that the lower court deemed it unnecessary to consider the sufficiency of the evidence under which the district court reached the conclusion of illegality. Had not this erroneous view been entertained, it would have been necessary to consider this evidence and pass upon the question of its sufficiency, and we believe the lower court would have done so. It did this in *Royal Oak Drain District v. Keefe,* 87 Fed. (2) 786.

(b) The lower court rejected the authority of *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, saying that "the villages themselves took part in the false recital" (R. 654). The Michigan Supreme Court, however, accepts these cases as authorities which would rule the decision in all cases involving drain bonds, *bona fide* held, where the bonds themselves contained no notice of infirmity. It held that the Royal Oak No. 7 Storm Sewer Drain District bonds contained this notice of infirmity because of the title of the improvement. It must necessarily follow from this that had the words "storm sewer" been omitted from this title, the decision would be the other way. It emphasized by quotation from the *Thompson* case, the following: "A *bona fide* purchaser for value had a right to rely upon the statement of the board, appearing on the bond, that it was issued to borrow money under this act, for lawful purposes, *i. e.,* public improvements" (See p. 11 Respondents' Brief). In this case the title of the proceedings and bonds, and all references therein, indicated that the improvement contemplated would be a drain (R. 21, 624). These bonds carried on their face a false pre-

tense, in that they certified that the money was to be spent to build a drain, and that all acts, conditions, etc. existed and had been performed to make them binding obligations.

(c) Recognition of the authority of *Thompson v. Mecosta (supra),* and other Michigan cases of like import, and the authorities cited therein, necessarily controverts the lower court's theory that the recitals in these bonds did not have such form as to make them inconsistent with the claim that the improvement was not to be a drain. In the *Thompson* case, the recital was merely compliance with the governing law. Hence the bonds not only recite compliance, but add the further statement of the due happening, existence and performance of all acts and events essential to their validity.

It cannot be doubted that had the lower court known the views of the Michigan Court of last resort, as expressed in this opinion, it would have eliminated from its opinion its determination that a decree in a prior suit was *res judicata,* that a drain district's bonds with recitals such as these do not carry a false pretense, and that such bonds would not estop the district to assert that the improvement built with their proceeds was not a drain. With these propositions eliminated, we believe it logical to infer that the lower court would have affirmed the district court's decree.

We submit that the opinion of the state court demonstrates vital errors by the lower court in its assumption that local law required it to reverse the district court in this case. Local law, in its application to drain bonds and the facts in this case, is now known, or will be as soon as this opinion of the Michigan court becomes final and official. Therefore, the petition for rehearing and petition for certiorari should be granted, and the case reversed and

remanded to the lower court, with directions to decide the case in accordance with the now known principal of local law.

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